

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In Re:)
)
AREDIA and ZOMETA PRODUCTS) No. 3:06-MDL-01760
LIABILITY LITIGATION) Judge Campbell/Brown
(MDL No. 1760))
)
This Document Relates to)
3:09-CV-0874 (Thomas, David))

TO: THE HONORABLE TODD J. CAMPBELL

REPORT AND RECOMMENDATION

The Defendant Novartis in this matter has filed a motion to dismiss for failure to obtain service of process under Fed. R. Civ. P. 4(m) (Docket Entry 11 and Docket Entry 3676).

Background

The Plaintiff responded by filing a motion for extension of time to file summonses and serve the Defendant (Docket Entry 12 and Docket Entry 3693, which the undersigned granted. The Defendants are correct that the Plaintiff failed to obtain service of process as required by Fed. R. Civ. P. 4(m). For some reason this lack of service was not considered or mentioned by the MDL panel and the case was transferred to this Court for handling under MDL procedures. While the Magistrate Judge does not condone the failure of the Plaintiff to note that service of process was not obtained, the Magistrate Judge cannot find any particular prejudice to the Defendant at this stage of the litigation.

There is a strong presumption that cases should be decided on their merits, absent some act of bad faith on the part

of the Plaintiff or some substantial prejudice to the Defendant. In this case the Magistrate Judge does not believe that either of these two key factors are present.

It now appears that service of process was obtained on October 5, 2010 (Docket Entry 3752).

Recommendation

For the reasons stated above, the Magistrate Judge recommends that the motion to dismiss be denied.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has 14 days, from receipt of this Report and Recommendation, in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have 14 days, from receipt of any objections filed in this Report, in which to file any responses to said objections. Failure to file specific objections within 14 days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *Reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 13th day of October, 2010.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge